Supreme Court, U.S.
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No. 97-180

In The

Supreme Court of the United States

October Term, 1996

ROBERT L. BARR, SR., *et ux.*,

Petitioners,

vs.

ANNE ARUNDEL MEDICAL CENTER, INC.
and ROSEMARY LETHBRIDGE, M.D.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In a medical malpractice case where each of the Respondents, including their attorneys, are white and each of the Petitioners, including their attorneys, are African-American, did the trial court abuse its discretion and/or deprive Petitioners of their rights to due process and equal protection, secured by the Fifth Amendment, and rights to freedom from badges and incidents of slavery, secured by the Thirteenth Amendment, when the court asked several questions on voir dire regarding prospective juror's ability to render a fair and impartial verdict, but precluded Petitioners from asking one specific question on voir dire as to whether prospective jurors would not be fair to the parties because of their race?

Did the trial court abuse its discretion and/or violate the Petitioner's rights to due process and equal protection, secured by the Fifth and Thirteenth Amendments, when it did not, *sua sponte,* conduct a *Batson* inquiry following Petitioners' conscious decision not to raise such a challenge?

Did the trial court abuse its discretion in admitting in evidence pursuant to Federal Rules of Evidence 1006, a compilation derived from voluminous medical records, the contents of which were combined in the medical records in evidence and supported by testimony given by witnesses at the time of the trial?

CORPORATE DISCLOSURE STATEMENT

Anne Arundel Medical Center, Inc., is a wholly owned subsidiary of the parent company Anne Arundel Health Systems, Inc., a private non-profit Maryland Corporation. There are no subsidiary corporations owned by Anne Arundel Medical Center, Inc.

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OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Fourth Circuit and the Order of Judgment and Order Denying Plaintiffs' Motion for New Trial by the United States District Court for the District of Maryland appear in Petitioners' petition.

STATEMENT OF JURISDICTION

Respondents agree with Petitioners' statement of the basis for jurisdiction in the Supreme Court as described in the Petition (*See*, Petition, p. 2).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Respondents agree with Petitioners' statement of Constitutional provisions involved in the case as described in the Petition (*See* Petition, pp. 3-4).

Respondents agree with Petitioners' statement of the statutes and rules involved in the case as described in the Petition (*See* Petition, pp. 5-6) with the following addition(s):

28 U.S.C. § 1870: Challenges

> In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly. All challenges for cause or favor, whether to the

array or panel or the individual jurors, shall be determined by the court.

STATEMENT OF THE CASE

The Petitioners, Robert Barr, Sr. and Catherine Barr, instituted Wrongful Death and Survival actions, pursuant to Maryland state law, against the Respondents, Anne Arundel Medical Center (hereinafter "AAMC") and Rosemary Lethbridge, M.D., for the death of their son, Robert Barr, Jr. The Complaint alleged that Robert Barr, Jr. died on September 25, 1989 due to the negligent medical care rendered by the Respondents on September 12, 1989 following Barr's near drowning incident. Trial commenced in the United States District Court for the District of Maryland on February 20, 1996 and the jury rendered its verdict in favor of the Respondents on March 1, 1996. Petitioners now seek review on certiorari by this Court of the opinion of the United States Court of Appeals for the Fourth Circuit affirming the jury verdict and judgment in favor of the Respondents. As is set forth in the succeeding section, there exists no cause for review on certiorari of the Fourth Circuit's opinion in this matter.

Pursuant to the mandates of Rule 15.1 of the Rules of the Supreme Court of the United States, Respondents herein identify several misstatements of fact made by the Petitioners within their Petition for Writ of Certiorari.

A. The Petitioners Misrepresent the Allegations, Pleadings and Issues Before the Jury and the District Court Relative to the Claim of Error in the Granting of Peremptory Challenges.

The Petitioners assert in their Statement of the Case that "[t]he court erred in granting the Respondents 4 peremptory

challenges while granting Petitioners only 3 peremptory challenges where the Respondents were presenting a joint defense and no cross claims were filed." (*See* Petition, p. 7). A review of the pleadings demonstrates a patent misrepresentation that the Petitioners' claims against the Respondents were the same.

Petitioners asserted individual and independent causes of action against each of the Respondents. In substance, the claims of negligence asserted against Rosemary Lethbridge, M.D. in Petitioners' Complaint were:

(a) Had a duty to, but failed to possess that degree of skill and knowledge to properly monitor the decedent's physical condition prior to conducting the nasotracheal intubation of the decedent;

(b) Had a duty to, but failed to properly treat Robert L. Barr, Jr.'s medical problems, in light of the fact that the [sic] had begun to expel large amounts of bloody fluid and partially digested food during the nasotracheal intubation procedure;

(c) Had a duty to, but failed to have and follow established emergency protocol for the treatment of person who are endotracheally intubated, one of whom was the decedent;

(d) Had a duty to, but failed to initiate preliminary testing of the decedent's physical condition, specifically after the sedation of the decedent with Valium and Morphine, prior to commencing the nasotracheal intubation procedure;

(e) Had a duty to, but failed to commence the nasotracheal

intubation while the decedent was coherent, and not in an adequately sedated state;

(f) Had a duty to, but failed to ensure that the initial dose of Valium was sufficient to complete the nasotracheal intubation procedure;

(g) Had a duty to, but failed to act in a timely manner to attempt to ensure that the stomach contents were emptied prior to beginning the intubation procedure;

(h) Had a duty to, but failed to provide proper medication to the decedent prior to the nasotracheal intubation procedure which would not severely and dangerously reduce decedent's gag reflex;

(i) Had a duty to, but failed to provide adequate sedation so that decedent would not vomit during the nasotracheal intubation procedure; and

(j) Had a duty to, but failed to delay the paralyzation with Pavulon of the decedent for forty (40) minutes after the sedation of the decedent with Valium, which severely and dangerously reduced the gag response of the decedent.

The claims of negligence made against Anne Arundel Medical Center in Petitioners' Complaint were:

(a) Had a duty to, but failed to posses that degree of skill and knowledge necessary to properly treat an individual suffering from the effects of a near drowning experience;

(b) Had a duty to, but failed to treat Robert L. Barr, Jr.'s medical problems in a timely manner;

(c) Had a duty to, but failed to have and to follow established protocol for the treatment of persons experiencing a near drowning condition compounded by an unstable respiratory state;

(d) Had a duty to, but failed to have and to follow established policies and procedures for the treatment of persons experiencing the effects of a near drowning;

(e) Had a duty to, but failed to properly carry out and monitor the nasotracheal intubation of the decedent;

(f) Had a duty to, but failed to diagnose, assess and treat hypoxemia;

(g) Had a duty to, but failed to acquire proper and necessary consultations by medical specialists;

(h) Had a duty to, but failed to conduct adequate and appropriate tests to identify the source of decedent's fever and/or infection;

(i) Had a duty to, but failed to properly educate Emergency Room and ICU medical care team members regarding proper diagnosis and treatment of the near drowning victim;

(j) Had a duty to, but failed to properly triage and prioritize the care of the decedent in the Emergency Room; and

(k) Had a duty to, but failed to properly prioritize the care of the ICU patients; and

(l) Had a duty to, but failed to timely transfer the decedent

> to a tertiary care medical facility capable of providing care for his complex medical problems.

Simply put, the Petitioners' assertion in their Statement of the Case that "the Respondents were presenting a joint defense" patently misrepresents the fact that the Respondents were defending themselves against separate and distinct claims. As is argued subsequently, given this circumstance, the trial court properly concluded that the Respondents had different interests and, thereafter, exercised its discretion in accordance with 28 U.S.C. § 1870.

B. The Petitioners Misrepresent the Record of the Case in Contending That the Respondents Used Their Four Peremptory Challenges to Strike Four African American Women.

The Petitioners assert in their Statement of the Case that "[t]he Respondents used their four peremptory challenges to strike four African American women on the basis of their race, in violation of the rights of Petitioners and prospective jurors to Equal Protection and Due Process as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution." (*See* Petition, pp. 7, 21)

As is detailed subsequently, there is absolutely no record in this case to support the Petitioners' contention that the Respondents used their four peremptory challenges to strike four African American women on the basis of their race. In fact, a review of the venire list, the only record available relative to this issue, reveals that there were not four women available to strike.

C. The Petition Is Misleading in That it Fails to Identify All of the Relevant Voir Dire Questions Posed to the Prospective Jurors Regarding Their Ability to Render a Fair And Impartial Verdict.

In discussing the efforts of the trial court during voir dire questioning, Petitioners misleadingly state that the "closest the trial court came to inquiring about racial bias were two general and abstract questions: . . ." . (*See* Petition, p. 14). Petitioners patently omit the Court's voir dire, *inter alia*, and the colloquy that immediately followed:

> THE COURT: Can you think of any other matter that you should call to the Court's attention which may have some bearing upon your qualifications as a juror in this case or which may prevent you from rendering a fair and impartial verdict based solely upon the evidence and my instructions on the law? I note no response.
>
> * * *
>
> MR. McCLELLAN: [I]n addition to that I would like to respectfully ask the Court to ask the panel in this particular case, the attorneys and the Plaintiffs are member of the back (sic) race. In this particular case, the Defendant and counsel are members of the white race. We would respectfully request that the Court inquire specifically to determine whether or not anybody has a predisposition for or against black persons or for or against white persons involved in this lawsuit.

> THE COURT: I think we covered that one. You have your exception.

At this stage of the trial, simple observation made it obvious that the Petitioners and their counsel were African American and that the Respondents and their counsel were Caucasian. As is detailed in the succeeding section, it is well settled case law that the trial judge's immediate perception and own evaluations of demeanor evidence and of responses to questions determine the scope of the questions to be asked. Moreover, in the absence of a racial issue intertwined within the conduct of the trial, to ask a specific voir dire question concerning racial prejudice may well serve to inject race into the trial and thereby create the risk of injustice by suggesting that, even though race is not an issue, justice nonetheless turns upon skin color.

D. Petitioners Misrepresent, in Several Respects, the Facts and Record Regarding the "Timeline."

Petitioners allege that the "Timeline" (a summary chart detailing the medical care rendered to Robert Barr, Jr) "contained numerous inaccuracies, material omissions, and editorial comments" and "was never produced by defense counsel for examination prior to trial and Respondents failed to lay any foundation for its admission, either by way of explaining how its contents were derived from source documents or from testimonial sponsorship." (*See* Petition, pp. 25-6). Petitioners' allegations misrepresent the facts in several respects.

First, Petitioners were provided a copy of the "Timeline" as early as two weeks prior to trial. Petitioners' counsel, Lavern Wiley, accompanied by paralegal Sheri-Ann Cowie, by scheduled appointment came to Dr. Lethbridge's counsels' office, in an effort, pursuant to the Federal Rules, to exchange trial exhibits and documents. Counsel for AAMC also attended

the meeting, during which time counsel for the Petitioners were provided with a copy of the "Timeline."

Second, an objective foundation for the Timeline was contained within the medical records and fully supported by witness testimony. Petitioners had the opportunity to cross-examine all of the witnesses at trial regarding any alleged inaccuracies within the "Timeline". Moreover, Petitioners themselves prepared and introduced typed summaries of certain notations extracted from the medical records which, taken together, were nearly identical to the "Timeline".

Trial testimony offered in conjunction with and objectively supporting the "Timeline" consisted of the following:

1. 3:00 — shift change (Dr. Lethbridge, pg. 5).

2. 3:00 — Nurse Dyson assessment (Dyson pgs. 80 & 93).

3. 2:45 — vital sign recorded (Dyson pgs. 78 & 92).

4. 2:45 — wearing 10 liter non-rebreather mask (Dyson pg. 79).

5. 3:00 — directed to specific trauma room (yellow four) (Dyson pgs. 82 & 95).

6. 3:05 — seen by Dr. Halpern, history obtained and tests ordered (Halpern Pgs. 96, 261-262, 264-266).

7. 3:20 — transport to x-ray with nurse (Gilbert Pg. 117).

8. 3:40 - 4:00 — placed on 50% ventimask (Bernstein Pgs. 245-246).

9. 4:00 — Dr. Bernstein accepts care of patient (Gilbert Pg. 103).

10. 4:08 — vital signs at 16:08 (Gilbert Pg. 110).

11. 4:08 — respiratory rate (Gilbert Pg. 114).

12. 4:08 — Valium given (Lethbridge Pgs. 59 & 61).

13. 4:20 — Dr. Lethbridge orders Valium and Morphine (Lethbridge Pgs. 61-62).

14. 4:35 — portable x-ray displays diffuse bilateral infiltrates (Bernstein Pg. 238).

15. 4:40 — bucking the ventilator (Larsen Pg. 943).

From a review of this trial testimony, it is clear, despite Petitioners' assertion to the contrary, that the "Timeline" was indeed an accurate and objective presentation of the facts as they appeared in the medical records. Therefore, as is discussed subsequently, the admission of the "Timeline" was not an abuse of discretion.

REASONS FOR DENYING THE WRIT

The Petitioners' claims that the court below erred do not warrant review by this Court. As this Court is acutely aware, the jurisdiction of the Supreme Court to review judgments or decrees of the courts of appeals by certiorari is guided by the considerations set forth in Rule 10 of the Rules of the Supreme Court of the United States and is "a jurisdiction to be exercised entirely in the discretion of the court, and the court will ordinarily grant the writ sparingly, and only in extraordinary cases of peculiar gravity and general importance, or in order to secure

uniformity of decision." 36 C.J.S. § 204(2). As is set forth below, each of the three bases upon which Petitioners seek granting of the Writ of Certiorari fails to rise to the level necessary to justify review by this Court.

I.

INQUIRIES REGARDING POTENTIAL JUROR RACIAL BIASES ARE PROPERLY ADDRESSED THROUGH GENERALIZED VOIR DIRE QUESTIONS ABSENT THE EXISTENCE OF CIRCUMSTANCES INDICATING A REASONABLE POSSIBILITY THAT RACIAL PREJUDICE WILL INFLUENCE THE JURY'S VERDICT.

Racial prejudice in the context of the courtroom is of considerable and long-standing concern. As such, the issue has garnered considerable judicial attention and an extensive body of law has developed. In the Petition for Writ of Certiorari, the Petitioners contend that, in the case at bar, the trial court's exercise of its discretionary power to preclude, during the conduct of voir dire, any specific inquiry regarding racial bias amounted to an abuse of the court's discretion and/or a deprivation of the Petitioners' Fifth and Thirteenth Amendment rights (*See*, Petition, p. 19). In essence, the Petitioners contend that the conduct of a fair trial by an impartial jury requires specific voir dire inquiries regarding racial bias, regardless of the circumstances of the case at hand. Such contentions are unpersuasive, being unsupported by pertinent case law, sound reasoning, and the record of this case.

The influence of racial biases on the civil litigation process has been addressed both with respect to the exercise of peremptory challenges and the potential for juror biases to effect jury verdicts. In order to eliminate racially motivated jury

verdicts, the courts, pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) and its progeny has delineated procedural methods aimed at uncovering bias in the exercise of peremptory challenges, as is discussed in greater detail in the succeeding section. In addition, the courts have indicated that, under certain limited circumstances, specific voir dire questions aimed at uncovering prospective juror biases are appropriate despite the risks associated with injection of the issue of race into the trial. However, the case at hand clearly does not pose the type of situation which necessitates specific voir dire questions regarding racial bias. Accordingly, the trial court, acting *sua sponte*, properly excluded petitioners' proposed question of this nature and adequately addressed the question of bias during voir dire.

The issue of when voir dire questions specifically concerning racial bias should be asked has been the subject of much discussion by courts of all levels in the criminal law context. However, Petitioners have neither located nor cited any authority for the proposition that specific voir dire questions regarding racial attitudes or biases may be mandated in a civil action.

Significantly, even within the criminal law context, a defendant is only entitled to pose voir dire questions concerning racial bias upon establishing: (1) that there exists special circumstances giving rise to the "reasonable possibility" that the jury's verdict may be influenced by racial or ethnic prejudice, *Rosales-Lopez v. United States*, 451 U.S. 182, 191, 101 S. Ct. 1629, 1635, 68 L. Ed. 2d 22 (1981); or (2) where a violent crime has occurred involving members of different racial or ethnic groups. *Rosales-Lopez*, 451 U.S. at 192. Special circumstances may be found whereby racial issues are "inextricably bound up with the conduct of the trial" requiring specific voir dire questions on racial prejudice. *Ristaino v. Ross*, 424 U.S. 589,

597, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976). Only a general inquiry regarding prejudice will suffice where there is no racial dimension to the alleged crime, the charges brought, or the evidence to be presented. *United States v. Washington,* 48 F.3d 73, 78 (2d Cir.1995), *cert. den.*, 515 U.S. 1151, 115 S. Ct. 2596, 132 L. Ed. 2d 843 (1995). Even where a defendant is tried in a State where there exists a "climate of racial prejudice", in the absence of "special circumstances" there need be no specific voir dire question concerning racial prejudice. *United States v. Eagle Thunder,* 873 F. Supp. 1362, 1385 (D. S.D.), *aff'd,* 51 F.3d 278 (8th Cir. 1994), *cert. den.,* 514 U.S. 1076, 115 S. Ct. 1721, 131 L. Ed. 2d 580 (1995). In the absence of a showing of special circumstances indicating a "reasonable possibility" of racial prejudice affecting the jury the trial court does not abuse its discretion in denying a request for a specific question. *United States v. Brown,* 767 F.2d 1078, 1083 (4th Cir. 1985).

Recently, the Fourth Circuit visited this issue in *United States v. Barber,* 80 F.3d 964 (4th Cir. 1996). In this criminal matter the defendants, a married couple consisting of an African American husband and a Caucasian wife, were charged with drug-related money laundering. The district court declined to ask a voir dire question concerning jurors' attitudes towards interracial marriages. The United States Court of Appeals for the Fourth Circuit affirmed that decision, and in reiterating the applicable abuse of discretion standard, held that ". . . [W]e may find an abuse of discretion in a federal court's refusal to ask prospective jurors about racial prejudice only when: (1) such a request has been made; and (2) there is a 'reasonable possibility' that racial prejudice might influence the jury." *Barber,* 80 F.3d at 968. The court, sitting *en banc*, held that the mere fact that the defendants were married and were members of different races did not imply that racial issues were "inextricably bound up with the conduct of the trial." *Id.* The *Barber* defendants failed to establish the "reasonable possibility" that racial prejudice

would influence the jury by asking a voir dire question admittedly proposed only to "clear the air" on the "nonissue" of race. *Id.* The Court wisely concluded that, in the absence of a racial issue intertwined within the conduct of the trial, to ask a voir dire question concerning racial prejudice would only serve to inject race into the trial and would create the risk of injustice by suggesting that even though race is not an issue, justice nonetheless turns upon skin color. *Barber,* 969 (*citing to Ristaino, supra*).

Thus, despite Petitioners assertions that a "don't mention race" approach serves to deny litigants of a fair trial by an impartial jury, it is clear that the Supreme Court, and other courts at a variety of levels, has considered the issue in a criminal context wherein the potential loss of a defendant's liberty may indeed require a higher level of scrutiny, and has reached a different conclusion. Specific voir dire questions concerning racial prejudice are only necessary where there exists circumstances indicating a "reasonable possibility" that the jury's verdict may be influenced by racial prejudice.

The Petitioners reliance upon language contained in the Supreme Court's ruling in *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991) is unpersuasive. In the *Edmonson* matter, this Court extended the use of *Batson* challenges to civil actions. The Petitioners rely upon an observation by the majority that the issue of juror bias "can be explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on ancestry or skin color." *Id.* at 631. Petitioners assert that this "admonition" requires the asking of specific voir dire questions regarding racial bias. Such an assertion blatantly disregards this Court's holding in *Rosales-Lopez* regarding the requirement that there exists circumstances pointing to a "reasonable possibility" of racial influence in the jury verdict and, in reality, asks this

Court to assume the existence of racial biases among the prospective jurors and to thereby abandon the "reasonable possibility" standard. This Court has wisely chosen a different approach to the issue, thereby minimizing the likelihood that jurors will come to believe that, even though race is not an issue in a given case, justice nonetheless turns upon skin color, a circumstance that might well result from the wholesale injection of race into a trial regardless of any indication of juror bias. Indeed, the very circumstances of the case at bar provide an excellent example of why this Court's approach is the correct one.

In this case, the mere fact that the Petitioners and their counsel were African-American, while respondents and their counsel were Caucasian, is insufficient to assume that racial biases exist among the prospective jurors and that such biases would serve to result in an unfair trial for the Petitioners. Race played no role in the conduct of the trial. To understand this, one need only take the time to read the trial transcript in its entirety — if the reader had no previous knowledge of the identity of the parties, he or she would be unable to discern the races of the individuals involved. Not one witness, either layperson or expert, alludes to race or implies through his or her testimony that race was ever an issue in this matter. Nor does an examination of the Complaint reveal any racial dimension whatsoever to the issues determined at trial. Furthermore, the Petitioners acknowledged below, in their Memorandum of Law in Support of Plaintiffs' Motion for New Trial, that they "have no specific evidence to support any allegation that the verdict rendered by the jury was affected by racial bias of any member"

Thus, it becomes apparent here, as in *Barber*, that Petitioners' proposed voir dire question was nothing more than an effort to "clear the air" on the nonissue of race. As the *Barber*

court wisely recognized, this sort of voir dire question not only does not give rise to a "reasonable possibility" that the jury verdict may be tainted by racial bias, but it creates the substantial risk of creating an issue of race where none had heretofore existed. The trial judge, relying upon well settled case law, as detailed in *Barber*, 80 F.3d at 967, and acting upon his "immediate perception" and "own evaluations of demeanor evidence and of responses to question", concluded that race was not an issue in this civil action. He, therefore, chose a proper, neutral approach and declined Petitioners' proposed question and inquired generally into prospective jurors potential biases.

The instructions of the Supreme Court in *Rosales-Lopez* and *Ristaino*, and their progeny, deftly balance the need to address the issue of potential juror bias with the risk of the creation of a racial "issue" through unwarranted inquiry of prospective jurors. Thus, despite Petitioners' assertions to the contrary, the well-reasoned, long-standing approach of this Court, and others at various levels, most adeptly serves the goal of affording litigants a fair trial by an impartial jury. For the preceding reasons, it is clear that the trial court did not abuse its discretion and/or deprive the Petitioners of their Constitutional rights when it denied Petitioners' request to pose a specific question on racial biases to the prospective jurors. Accordingly, the review of this issue on a writ of certiorari is not warranted.

II.

TRIAL COURTS ADMINISTER A VARIETY OF SAFEGUARDS TO ENSURE A JURY SELECTION PROCESS THAT IS FREE FROM BIASES OF ANY SORT AND THE ACTIONS OF THE TRIAL COURT BELOW IN ADMINISTERING THESE SAFEGUARDS DO NOT CONSTITUTE AN ABUSE OF DISCRETION.

There exist numerous safeguards within the jury selection process which seek to ensure that the selection of jurors and the rendering of jury verdicts are free from the influence of racial bias. *Batson v. Kentucky*, *supra*, and its progeny, addresses the potential for biases held by participating counsel to impact the judicial process by permitting parties to challenge perceived race-based peremptory challenges by an opponent. Similarly, the possibility of juror racial biases tainting jury verdicts is addressed through voir dire inquiry in a generalized manner absent the existence of circumstances indicating a reasonable possibility that racial prejudice will influence the jury's verdict. As detailed in the preceding section, the Supreme Court's holdings in *Rosales-Lopez* and *Ristaino*, and their progeny, make clear the delicate balance that must be struck between the need to address the issue of potential juror bias and the risk of the creation of a racial "issue" through unwarranted inquiry of prospective jurors. Petitioners now assert that the safeguards set forth in the pertinent opinions of this Court and others are insufficient and that trial courts should have an "independent duty" to protect the rights of litigants and prospective jurors from racial discrimination in the jury selection process. In support of their assertion of a need for an "independent duty", Petitioners contend that three actions occurring in the trial court below compromised Petitioners' ability to present their case on a level playing field. This contention, unsupported by any cited case law, is without merit, and it disregards the existing judicial

safeguards which squarely confront the concerns that Petitioners seek to address.

Furthermore, Petitioners' references to the approach of the trial court below as being flawed represent an effort to conduct an "end around" the reality that the trial court's efforts in this matter effectuated the safeguards and do not amount to an abuse of discretion. Accordingly, as with the previous assertion regarding the adequacy of the trial court's approach to voir dire questioning, Petitioners have failed to demonstrate that this issue amounts to an extraordinary case of peculiar gravity and general importance so as to warrant review on certiorari.

Petitioners first allegation in support of their assertion pertains to the trial court's granting of four peremptory challenges to the Respondents while limiting the Petitioners to three such challenges. It is difficult to perceive how this discretionary action of the trial court, performed in accordance with the terms of 28 U.S.C. § 1870 and applicable case law, supports, in any manner, Petitioners' assertion.

Pursuant to 28 U.S.C. § 1870, where there are multiple defendants, "the court may allow additional peremptory challenges and permit them to be exercised separately or jointly." By its very terms, "the statute permits the trial judge to allocate more than three peremptory challenges when more than one plaintiff or defendant is present in a case", *Fedorchick v. Massey-Ferguson. Inc.*, 577 F.2d 856, 858 (3d Cir. 1978). The manner in which peremptory challenges are exercised is a matter of local custom and traditionally has been left to the sound discretion of the district court. *United States v. Blanton*, 700 F.2d 298, 308-309 (6th Cir.), *rev'd on other grounds*, 719 F.2d 815 (6th Cir. 1983) (en banc), *cert. den.*, 465 U.S. 1099, 104 S. Ct. 1592, 80 L. Ed. 2d 125 (1984); *United States v. Anderson*, 562 F.2d 394, 396-97 (6th Cir. 1977). The trial judge has discretion as to the

number of peremptory challenges. 28 U.S.C. § 1870; *Smith v. Pressed Steel Tank Co.*, 66 F.R.D. 429 (E.D. Pa. 1975), *aff'd.*, 524 F.2d 1404 (1975), and "[i]n reviewing the trial judge's allocation of peremptory challenges in a multi-party civil case, our standard of review is whether the trial judge abused his discretion". *Id. See also Nehring v. Empresa Lineas Maritimas Agentinas*, 401 F. 2d 767, 768 (5th Cir. 1968), *cert. den.*, 396 U.S. 819, 90 S. Ct. 55, 22 L. Ed. 2d 69 (1969). "The use of the word 'may' in the statute confers judicial discretion on the trial court". *Standard Industries v. Mobil Oil Corp.*, 475 F.2d 220, 225 (10th Cir. 1973).

As previously detailed in Respondents' Statement of the Case, the trial court below, *sub judice*, specifically addressed the number of peremptory challenges to be allocated, concluding that the Respondents had different interests and then instructing the Respondent defendants to not corroborate with regard to peremptory challenges.

The trial court did not abuse its discretion in allocating Petitioners three peremptory challenges as opposed to the four allocated to the Respondents given the fact that the Respondents had obviously distinguishable interests. Dr. Lethbridge and AAMC were each represented by separately retained counsel, and moreover, there was no stipulation that a verdict against Dr. Lethbridge would likewise apply against AAMC. Furthermore, a cursory examination of the Petitioners' Complaint reveals that they asserted many separate and distinct, albeit unproven, counts of direct negligence against Respondent AAMC. Beyond this, Respondents clearly distinguished their interests by the fact that they formulated and conducted their own discovery and separately retained expert witnesses on their respective behalf. Given the obvious distinguishable interests between the Respondents, the trial court's granting of four peremptory challenges clearly does not constitute an abuse of discretion.

See Goldstein v. Kelleher, 728 F.2d 32, 37 (1st Cir. 1984), *cert. den.*, 469 U.S. 852 (1984) (wherein the court held that if each defendant has "even colorably different interests from the other" the granting of additional peremptory challenges will not be questioned).

Petitioners' second point in support of the need for an "independent duty" pertains to the trial court's refusal to ask a specific voir dire question regarding prospective jurors' racial biases, a matter which has been thoroughly briefed in the preceding section. Under the circumstances of this particular action, *i.e.*, where there existed no racial dimension to the issues at trial, and the sole racial "issue" at trial was the fact that Petitioners and their counsel were African American while Respondents and their counsel were Caucasian, the trial court properly and adequately addressed the potential for juror racial biases with several inquiries including the question:

> Can you think of any other matter that you should call to the Court's attention which may have some bearing upon your qualification as a juror in this case or which may prevent you from rendering a fair and impartial verdict based solely upon the evidence and my instructions on the law? I note no response.

The trial court's actions relative to this issue do not amount to an abuse of discretion. Moreover, Petitioners have failed to show how the trial court's adherence to the applicable holdings of the Supreme Court and other courts as to this issue is insufficient to protect the rights of citizens and litigants to participate in a jury selection process free of racial biases.

Finally, Petitioners' most specious assertion in support of

their call for an "independent duty" is their claim that the trial judge witnessed the Respondents' use of all four of their peremptory challenges to strike four African American women without taking action. As noted in Respondents' Statement of the Case, Petitioners' assertion is a blatant misrepresentation of the facts in this case. Accordingly, the assertion is without merit, initially for the reason that it is not true, but, moreover, even assuming that it were true, Petitioners' failed to preserve their objection by consciously waiving a *Batson* challenge at the time of jury selection.

Petitioners' assertion is made without any record support whatsoever. "Counsel's representation is not an adequate substitute for a record showing," *Goldstein v. Kelleher*, 728 F.2d 32, 37 (1st Cir. 1984), *cert. den.*, 469 U.S. 852 (1984). Petitioners concede that, for "tactical reasons", they failed to mount a *Batson* challenge to Respondents' peremptory strikes at the time of jury selection.[1] As a result of that tactical decision, even if this Court were to consider the element of Petitioners' assertion of the need for an "independent duty", Petitioners have deprived this Court of a record from which to make a determination of the merits of their argument.

As previously stated, *Batson, supra*, permits a party to challenge perceived race-based peremptory challenges by an opponent. This involves a "prima facie case of purposeful discrimination" which is made when the complaining party

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1. As a result of Petitioners' waiver of a Batson challenge, there is simply no record from which this Court can gauge the accuracy of appellants assertion, except one. A review of the venire list makes clear that of the thirteen potential jurors on the venire list, seven were not seated, presumably because they were peremptorily stricken by the parties. Of these seven, only two are female. Therefore Petitioners' assertion that Respondents struck "four African-American women" cannot be true, since there were not four women available to strike.

establishes facts and circumstances which raise an inference that the peremptory challenge was intended to exclude a juror on account of race. Having made a prima facie case, it becomes the burden of the opposing party to "come forward with a race-neutral explanation for challenging black jurors". *Batson*, 476 U.S. at 97, 106 S. Ct. at 1723.

The so-called "*Batson* challenge" has been extended in recent years to include civil trials, *Edmonson v. Leesville Concrete Co. Inc., supra*, and to instances of perceived gender discrimination, *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).

Even in a civil action, when a party fails to mount a *Batson* challenge to perceived discriminatorily exercised peremptory challenges, his objection is deemed waived. *Edmonson*, 500 U.S. at 631, 111 S. Ct. at 2089; (". . . The same approach applies in the civil context, and we leave it to the trial courts in the first instance to develop evidentiary rules for implementing our decisions"). *Clark v. Newport News Shipping & Dry Dock Co.*, 937 F.2d 934, 937 (4th Cir. 1991); *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 210 (5th Cir. 1992). "Knowing the facts, the party cannot sit idly by, make no objection, and then after a verdict is returned against him, challenge it on the grounds that the jury was not legally constituted and was not a valid jury". *Goldstein v. Kelleher*, 728 F.2d 32, 38 (1st Cir. 1984), *cert. den.*, 469 U.S. 852 (1984). "In the absence of any indication that the jury was unsatisfactory to plaintiffs at the time chosen, we are unwilling to reverse the verdict of a jury that to all appearances was disinterested, competent and suitable". *Goldstein*, 38 (citations omitted).

In *Clark, supra*, the plaintiff, as did Petitioners in this matter, urged plain error as the basis for reversal where he, as here, had failed to object, pursuant to *Batson*, to defendant's peremptory

challenges. The court rejected the plain error argument, and succinctly stated:

> Neither *Batson* nor its progeny suggest it is the duty of the court to act *sua sponte* to prevent discriminatory exclusion of jurors. Rather, even *in criminal cases,* the objection is deemed waived if it is not timely raised "... Appellant's assertion of plain error cannot be supported and he is foreclosed from raising the issue here because of his failure to timely object". *Clark*, 939-40. (Emphasis added).

In this matter, Petitioners', having failed to take advantage of the *Batson* protections against race-based peremptory challenges by an opponent, now request this Court to assume the need for some additional duty in this regard on behalf of civil trial courts. These current efforts to convince this Court that the existing safeguards, of which they chose not to avail themselves, are insufficient is questionable at best. Furthermore, given this Court's repeated visitation to this issue, it is difficult to imagine that the Court would counsel such after-the-fact tactics.

In summary, Petitioners' "independent duty" argument plainly disregards existing judicial safeguards which squarely confront the concerns that they seek to address and the fact that the approach of the trial court below effectuated those safeguards within the context of this case. Furthermore, Petitioners' contention that the trial court had an obligation, *sua sponte*, to conduct a *Batson* inquiry is based upon their patent misstatement of the facts with regard to Respondents use of their peremptory challenges to eliminate African American women and is, therefore, fatally flawed. These realities, coupled with the

Petitioners' inability to cite any case law in support of its claim, renders ineffectual their efforts to demonstrate that this issue amounts to an extraordinary case of peculiar gravity and general importance so as to warrant the granting of a writ of certiorari.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE "TIMELINE OF CARE" AND THE DECISION OF THE COURT OF APPEALS TO AFFIRM THE JUDGMENT IN THIS CASE IS NOT IN CONFLICT WITH THE PERTINENT DECISIONS OF OTHER COURTS OF APPEALS AND, THEREFORE, DOES NOT REQUIRE REVIEW ON CERTIORARI.

Petitioners contend that the lower court abused its discretion in admitting a "Timeline of Care" and that the ruling of the Court of Appeals for the Fourth Circuit relative to the admission into evidence of a "Timeline of Care" places that court in conflict with other circuits "in terms of the interpretation of the importance of the carefully crafted safeguards embodied in the Federal Rules of Evidence pertaining to the admissibility of a summary" (*See* Petitioners' brief, p. 23). In support of this claim, Petitioners rely upon their now well-worn arguments that they were prejudiced by the admission of the "Timeline" because: (1) the "Timeline" was not produced by defense counsel for examination prior to trial; (2) the records that the "Timeline" purported to represent were not voluminous; (3) the "Timeline" was inaccurate; and (4) there existed no foundation for the introduction of the "Timeline".

Fed. R. Evid. 1006 provides in pertinent part:

> The contents of voluminous writings,

> recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Petitioners' contention that they were prejudiced because they were not provided the "Timeline" prior to trial is wholly without merit. By its very terms, Rule 1006 requires *only* that the original (or duplicate) documents shall be made available for examination or copying by an opposing party, and does not refer to production of the "Timeline" itself. *See* J. Weinstein & M. Berger, *Weinstein's Evidence* ¶1006[04] at 1006-8 (1975). In general, equal accessibility by the opposing party to the original document or materials from which a summary is drawn satisfies the requirement that they be made available for examination and copying. *United States v. Strissel*, 920 F.2d 1162, 1166 (4th Cir. 1990). Further, although the underlying documents must be made available for inspection by the opposing party, a summary itself need not be made available before its introduction into evidence. *United States v. Foley*, 598 F.2d 1323 (4th Cir.), *cert.den.*, 444 U.S. 1043, 100 S. Ct. 727, 62 L. Ed. 2d 728 (1979). In fact, Petitioners were provided a copy of the "Timeline" as early as two weeks prior to trial.[2]

As to Petitioners' assertion that the summarized records

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2. As set forth in Respondents' Statement of the Case, Petitioners' counsel, Lavern Wiley, accompanied by paralegal Sheri-Ann Cowie, by scheduled appointment came to Dr. Lethbridge's counsels' office in an effort, pursuant to the Federal Rules, to exchange trial exhibits and documents. Counsel for AAMC also attended this meeting, during which time appellants were provided a copy of the "Timeline".

were not voluminous, it is sufficient to note that the medical records consisted of documentation of seven days of critical care hospitalization at AAMC as well as hospitalization at University of Maryland Hospital. Interspersed among these voluminous records, encompassing two weeks of hospitalization, were the pages critical to the focus of the issues at trial, the emergency care provided to Midshipman Barr. Rule 1006 is premised upon the common law rule that a party may prove the contents of voluminous writings that cannot be examined in court, *without creating inconvenience or waste of time*, by presenting evidence of their contents in the form of testimonial or written charts, summaries or calculations.[3]

Furthermore, various courts have held that the "voluminous" requirement must not be interpreted literally and restrictively. *United States v. Winn*, 948 F.2d 145, 158 (5th Cir. 1991), *cert. denied*, 503 U.S. 976, 112 S. Ct. 1599, 118 L. Ed. 2d 313 (1992) (citing *United States v. Stephens*, 779 F.2d 232, 238 (5th Cir. 1985).

The last two arguments advanced by the Petitioners, the alleged inaccuracies of the "Timeline" and the lack of a foundation for its admittance, are directly addressed by the Court of Appeals following the court's conclusion that none of the other issues raised on appeal gave cause to reverse the district court. As to these two issues, the court stated:

> We find that the record supports the majority of the information in the summary chart. Any other inaccuracies are immaterial.

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3. *United States v. Caswell*, 825 F.2d 1228 (8th Cir. 1987) (In *Caswell*, the trial court properly admitted summary charts that were based on testimony at trial; summary witness testimony may be received when it is based on evidence in the case and the witness is available for cross-examination).

> Nonetheless, the summary chart should have been authenticated by its preparer before the district court admitted it. This error does not require reversal, however, given the extensive evidence in the record supporting the jury's verdict.

Petitioners allege that this holding results in a conflict of opinions between the United States Court of Appeals for the Fourth Circuit and other United States Courts of Appeal. In support of this assertion, Petitioners cite to the rulings of the United States Court of Appeals for the Second Circuit in a matter known as *United States v. Citron,* 783 F.2d 307 (2d Cir. 1986) and the United States Court of Appeals for the Ninth Circuit in *United States v. Wood,* 943 F.2d 1048 (9th Cir. 1991). Petitioners' reliance on these cases to support an assertion of a conflict among the Courts of Appeals, thereby necessitating this Court's review, is without merit.

In *Citron*, the defendant was charged with tax evasion and the prosecution presented a chart which purported to show the defendant's available funds without providing explanatory testimony. The trial court, despite finding a lack of foundation for the summary, admitted the chart into evidence. The Court of Appeals found the district court's admittance, without consideration of whether the chart was based on the evidence, an abuse of discretion. Petitioners assert that the Court of Appeals in the case at bar, by failing to reach the same conclusion, has rendered an opinion in conflict with the Second Circuit court's holding.

However, Petitioners fail to cite to the portion of the *Citron* decision most pertinent to this case. The *Citron* court, citing to *United States v. Conlin,* 551 F.2d 534 (2d Cir. 1977), *cert. denied,* 434 U.S. 831, 98 S. Ct. 114, 54 L. Ed. 2d 91 (1977), went one

step further in its analysis and gave consideration to the question of whether the evidence presented in the *Citron* case was overwhelmingly in support of the jury's verdict. *Citron*, 317. Given the record before it, the *Citron* court concluded that it was not.

Similarly, the same court, in *Conlin*, conducted the same analysis after determining that the summary was not supported by the record. The court held as follows: "We conclude, however, from a study of the entire record that in the circumstances of this case this error did not deprive appellant of a fair trial" and "proof of appellant's guilt [was] overwhelming." *Conlin*, 539. This analysis represents the exact approach taken by the Court of Appeals for the Fourth Circuit in the case at bar. Even assuming, *arguendo*, that the "Timeline" was not supported by the record, a finding which the court did not reach[4] , the court concluded that the lack of authentication by the preparer did not require reversal "given the extensive evidence in the record supporting the jury's verdict." The alleged conflict between this decision and the opinions of the Second Circuit Court of Appeals simply does not exist.

Next, Petitioners assert that the holding of the United States Court of Appeals for the Ninth Circuit in *United States v. Wood, supra*, emphasizing an important distinction between a summary admitted pursuant to Federal Rules of Evidence Rule 1006 and a summary admitted as demonstrative evidence, is in conflict with the holding in this case. Therein, the court held that summaries of testimony or documents actually admitted into evidence as pedigogical devices "should not be admitted into evidence or otherwise be used by the jury during deliberations." *Wood*, 1053. Given the fact that the entire medical record

4. The court expressly found "that the record supports the majority of the information in the summary chart. Any other inaccuracies are immaterial." (App. 3A.)

underlying the "Timeline" was introduced into evidence in the case at bar, Petitioners' assert, the Fourth Circuit's countenance of its admission somehow renders its holding in conflict with that of the Ninth Circuit. The argument is unpersuasive and of no consequence.

First, commentators have readily pointed out that the referenced holding in *Wood* should not be followed:

> As the case itself recognizes, it is difficult to distinguish the two situations and then hard if not impossible to defend the position that a chart summarizing not admitted evidence can, in the court's discretion, be sent to the jury room but that a similar chart summarizing admitted evidence offered by an opposing party may not.

M. Graham, *Federal Practice and Procedure: Federal Rules of Evidence*, Sec. 7031 (1997 Pocket Part).

Petitioners' assertion that the Supreme Court ought to grant a writ of certiorari to review a decision that, in all regards, is consistent with all other Courts of Appeal, barring one decision that has been expressly criticized, patently ignores the countenance of Rule 10 of the Rules of the Supreme Court that a petition for a writ of certiorari will be granted "only for compelling reasons."

Finally, and perhaps most importantly, the opinion of the United States Court of Appeals for the Fourth Circuit in this matter was unpublished. Pursuant to Local Rule 36(c) of the Local Rules for the United States Court of Appeals for the Fourth Circuit, unpublished opinions are not binding precedent in the Fourth Circuit. Assuming *arguendo* that the decision somehow

is in conflict a decision of another Court of Appeal, such a conflict between an unpublished decision that is not binding precedent and a widely criticized decision is not worthy of the Supreme Court's review on certiorari.

In light of the fact that the "Timeline" was a detailed, accurate and objective compilation derived from voluminous medical records and with sufficient detrimental support to warrant its inclusion into evidence, it is clear that the trial court's admission of the summary does not amount to an abuse of discretion. Furthermore, the Court of Appeals, following its conclusion that the "Timeline" should have been authenticated by its preparer prior to admittance, properly considered the extent of the evidence in the record supporting the jury's verdict. This analysis is consistent with that order taken by other Courts of Appeal and, therefore, is not appropriate for review by this Court on certiorari.

CONCLUSION

For all the foregoing reasons, Respondents pray that this Honorable Court will deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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